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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of)
Petition of WorldCom, Inc. Pursuant)
to Section 252(e)(5) of the)
Communications Act for Expedited)
Preemption of the Jurisdiction of the)
Virginia State Corporation Commission)
Regarding Interconnection Disputes)
with Verizon-Virginia, Inc., and for)
Expedited Arbitration)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 00-218

REBUTTAL TESTIMONY OF ROBERT PETERSON AND MATT HARTHUN

(Issues III-15, IV-107)

013

September 5, 2001

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1 **Issue III-15**

2 **(Use of Embedded Intellectual Property of Third Parties)**

3 **Q. What is WorldCom's position on this issue?**

4 A. Although Verizon attempts to conflate WorldCom's position with AT&T's
5 position, the two are distinct, and WorldCom's position is clear. In accordance with the
6 findings of the FCC¹ and the United States Court of Appeals for the Fourth Circuit,² the
7 Interconnection Agreement should provide WorldCom with real assurances that Verizon
8 will use its best efforts to provide access to its network, equipment and software on a
9 non-discriminatory basis. WorldCom appropriately calls upon the FCC to order the
10 inclusion of the proposed terms and conditions as a means of implementing the legal
11 obligations Verizon owes to WorldCom.

12
13 **Q. Are the terms and conditions you request outlined in your Direct Testimony?**

14 A. Yes. We included in our Direct Testimony the specific language that we believe
15 the Commission should adopt. Included in that language was a modification made to
16 address a concern raised in mediation regarding the clarity of our language.

17
18 **Q. What would WorldCom's proposed language specifically provide?**

19 A. WorldCom's proposed language would do three things: (i) require Verizon to use

¹ See In re Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-Use Agreements Before Purchasing Unbundled Elements, Memorandum Opinion and Order, 15 F.C.C.R. 13896 ¶ 9 (2000) ("Une Licensing Order").

² AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc., 197 F.3d 663, 670 (4th Cir. 1999).

1 its best efforts to negotiate any necessary licenses needed to allow competitive carriers to
2 interconnect with Verizon's network or purchase and use unbundled network elements;
3 (ii) enumerate the consequences of Verizon's failure to use its best efforts in negotiations;
4 and (iii) require that Verizon not intentionally alter existing licensing agreements in order
5 to interfere with WorldCom's use of third parties' intellectual property. These provisions
6 would be consistent with customary practices in this area.

7 More specifically, in the event that Verizon fails to use its best efforts to negotiate
8 any necessary licenses, the proposed indemnification clause would require Verizon to
9 indemnify WorldCom against any claims brought for violations of a third party's
10 intellectual property rights and, accordingly, give meaning to Verizon's legal obligation
11 to use its best efforts in negotiating with existing and future vendors. The proposed
12 warranty and notification clauses would, consistent with common and prudent business
13 arrangements in the area, ensure that Verizon actively protect WorldCom's interests in
14 the same way Verizon would protect its own from third party intellectual property claims.

15 These clauses are completely consistent with the fundamental pro-competition,
16 anti-discrimination principles of the Act.³ As new entrants in a market that was
17 previously controlled by Verizon, WorldCom and other CLECs are at a substantial
18 competitive disadvantage in obtaining licenses to use the intellectual property embedded
19 in the network. For cost and efficiency reasons, WorldCom and other CLECs must rely
20 on Verizon's relationships and negotiations with the vendors whose intellectual property

³ See UNE Licensing Order, ¶ 9 ("We conclude that the 'nondiscriminatory access' obligation in section 251(c)(3) requires incumbent LECs to use their best efforts to provide all features and functionalities of each unbundled network element they provide, including any associated intellectual property rights that are necessary for the requesting carrier to use the network element in the same manner as the incumbent LEC. In particular, incumbent LECs must exercise their best efforts to obtain co-extensive rights for competing carriers purchasing unbundled network elements.").

1 is used in the network. Indeed, the FCC has observed “that incumbent LECs control the
2 choice of third party vendors, the scope of contracts with those vendors, and, along with
3 the vendors, are well-situated to interpret ambiguous portions of those contracts.” UNE
4 Licensing Order, ¶ 9. It is for this reason that Verizon and other incumbent LECs “are in
5 the best position to determine whether existing contracts permit requesting carriers to use
6 unbundled elements without modifying the contract to permit an extension of the right to
7 use the intellectual property, to renegotiate the existing contracts if an extension is
8 required, and to negotiate future contracts to ensure that competing carriers’ use of
9 intellectual property present in an element is contemplated.” Id.

10 Furthermore, a simple statement that Verizon must use its ‘best efforts’ in
11 negotiating with third party vendors on behalf of WorldCom is not sufficient and
12 represents an inappropriately minimalist approach. The FCC expressly left to the
13 negotiating parties the question of “how to ensure that an incumbent LEC lawfully
14 provides access to unbundled network elements to requesting carriers without infringing
15 upon the rights of third party vendors”. UNE Licensing Order, ¶ 9. Following the FCC’s
16 suggestion, WorldCom has simply proposed to include in the Interconnection Agreement
17 unambiguous and enforceable terms and conditions that give meaning to Verizon’s
18 obligation to negotiate on behalf of WorldCom and other CLECs. The indemnification
19 obligation only comes into play once (i) Verizon has failed to use its legally-required best
20 efforts; and (ii) a third party asserts a claim against WorldCom.

21
22 **Q. Please describe the Verizon Direct Testimony to which you are responding.**

1 A. Verizon asserts that WorldCom’s proposed language goes further than the
2 requirements of applicable law. It asserts that WorldCom would require Verizon to
3 indemnify WorldCom against intellectual property claims even when Verizon has used
4 its best efforts in negotiating with the third party vendor in the event those negotiations
5 fail. It essentially believes that WorldCom has proposed that Verizon be a guarantor for
6 WorldCom irrespective of the effort it puts into negotiations. Verizon GT&C Panel, 10.

7

8 **Q. Does Verizon accurately describe the dispute?**

9 A. No. Verizon’s testimony does not address the dispute at issue. The issue, as set
10 forth in WorldCom’s Petition states, in part, “[s]hould th[is] provision require Verizon to
11 indemnify WorldCom against third party intellectual property claims arising out of
12 WorldCom’s use of Verizon’s network, in the event that Verizon fails to use its best
13 efforts to negotiate such rights for MCIm?” (emphasis added). In addition, during the
14 mediation on this issue WorldCom made absolutely clear that it does not propose that
15 Verizon serve as a guarantor of third party intellectual property or that Verizon be strictly
16 liable for the outcome of its negotiation with third party vendors. Instead, the issue has
17 always been, as WorldCom explained in mediation, that the indemnification provision
18 would apply only if Verizon did not use its best efforts to negotiate a license as Verizon
19 is required to do. WorldCom’s originally proposed contract language only obligated
20 Verizon to indemnify WorldCom in the event that Verizon failed to satisfy its “best
21 efforts” negotiation requirement. WorldCom indicated in the mediations that it would
22 alter its proposed contract language to make that abundantly clear and to avoid any doubt.
23 WorldCom has done so. Verizon, however, continues to mischaracterize the issue and

WorldCom's proposed contract language. WorldCom is completely at a loss as to why Verizon continues to insist that WorldCom seeks something that it does not.

Q. What is WorldCom's response to Verizon's Direct Testimony on this issue?

A. As explained above and in our Direct Testimony, WorldCom proposes nothing more than what the FCC and the Fourth Circuit have ordered; the Interconnection Agreement must ensure that Verizon will use its 'best efforts' in negotiating intellectual property licensing with third parties. WorldCom's proposed language would require indemnification against third party claims of intellectual property violations only in the event that Verizon fails to follow the 'best efforts' standard set out by the FCC and the Fourth Circuit. Put differently, WorldCom does not propose that Verizon indemnify WorldCom against intellectual property claims when Verizon actually has used its best efforts – it proposes indemnification in the event that Verizon has not. The proposed language is a prudent and reasonable means of implementing these requirements, and is completely appropriate for an Interconnection Agreement between the parties. An Agreement that lacked these terms would be ineffective at ensuring that Verizon will use its best efforts because Verizon has every incentive to interpret its license agreements with third party vendors so narrowly as to exclude WorldCom and other CLECs.⁴

Q. Is the New York Public Service Commission order on which Verizon relies applicable?

⁴ See UNE Licensing Order, ¶ 10 ("If incumbent LECs were not required to obtain the right for requesting carriers to use the network elements, they would likely have an incentive to interpret their licenses with these providers as narrowly as possible to make it more difficult for competing carriers to obtain access to the elements.").

1 A. No. Verizon's reliance on an order by the New York Public Service Commission
2 ("New York Commission" or "state commission") is misplaced.⁵ As an initial matter, as
3 a decision arising from another state, it is not binding on the parties here. The New York
4 Commission's decision is completely inapposite. Even based on Verizon's own
5 recounting, that state commission found that Verizon could not be the guarantor of
6 AT&T. Although we do not know whether AT&T's proposal here is the same as its
7 proposal to the New York Commission, as has been explained above, WorldCom's
8 proposed language does not ask that Verizon become WorldCom's guarantor. Therefore,
9 WorldCom's proposal here is different than the AT&T proposal ruled on by the New
10 York Commission. Thus, the New York Commission did not even purport to address the
11 specific indemnification and warranty clauses proposed by WorldCom here.

12 Indeed, the only issue presented by WorldCom here that overlaps with an issue
13 decided by the New York Commission is one in which the New York Commission ruled
14 in favor of the new entrants. In its decision, the state commission found that a
15 notification clause like the one proposed by WorldCom – a provision that would require
16 Verizon to "immediately and explicitly notify AT&T" of its failure to reach an agreement
17 with the third party vendor on whether CLECs would be given a license to use embedded
18 intellectual property – should be included in the agreement between AT&T and Verizon.
19 New York Commission Order, 28-29.

⁵ See Verizon GT&C Panel, p.10 line 16 to p.11 line 2 (citing Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc. ("New York Order"), Case No. 01-C-0095, 23 (July 30, 2001)).

1 **Q. What does WorldCom request of the Commission?**

2 A. WorldCom requests that the Commission order the inclusion of WorldCom's
3 proposed contract language, as set forth in our Direct Testimony.

4

5 **Issue IV-107**

6 **(Use of Each Other's Embedded Intellectual Property)**

7 **Q. What is WorldCom's position on this issue?**

8 A. The Interconnection Agreement should make clear that it does not itself create or
9 modify the parties' intellectual property rights. It should provide that, when one party
10 interconnects with the other or leases a portion of the network from the other, the lessee
11 only obtains a limited right to use the intellectual property owned by the lessor. This
12 provision is typical of business agreements involving the use of technology, and makes
13 unambiguous the parties' respective rights with respect to the use of intellectual party
14 owned by each other.

15

16 **Q. Are the terms and conditions you request outlined in your Direct Testimony?**

17 A. Yes. We included in our Direct Testimony the specific language that we believe
18 the Commission should adopt.

19

20 **Q. Please describe the Verizon Direct Testimony to which you are responding.**

21 A. Again, Verizon utterly misstates the issue, and does not even purport to address
22 the issue presented here. First, Verizon asserts that this issue is the same as Issue III-15.
23 Second, Verizon asserts that "applicable law does not generally require Verizon to

1 attempt to negotiate to acquire intellectual property rights for the benefit of a CLEC, and
2 then indemnify that CLEC if it fails to acquire such rights.” Verizon GT&C Panel, 29.

3
4 **Q. How do Issues III-15 and IV-107 differ?**

5 A. As set forth in WorldCom’s Petition, Issue 107 states, “[s]hould the
6 Interconnection Agreement contain a provision regarding intellectual property rights
7 stating that (1) any intellectual property originating from or developed by a Party remains
8 in the exclusive ownership of that Party; and (2) the Interconnection Agreement does not
9 grant either Party any form of license in the other Party’s intellectual property (with the
10 exception of certain limited use licenses)?” The statement of the issue and WorldCom’s
11 proposed contract language for addressing it are confined to the intellectual property
12 owned by the individual parties (Verizon or WorldCom). Therefore, Issues III-15 and
13 IV-107 are completely different. Nothing in Issue IV-107 or the language WorldCom
14 proposes the Commission adopt pursuant to Issue IV-107 addresses obtaining and using
15 the intellectual property rights of third parties that might be embedded in Verizon’s
16 network. This is subject matter of Issue III-15. This, too, was discussed during
17 mediation. It is not clear why Verizon continues to treat these as if they were the same
18 issue.

19
20 **Q. You asserted that Verizon’s statement that “applicable law does not**
21 **generally require Verizon to attempt to negotiate to acquire intellectual property**
22 **rights for the benefit of a CLEC, and then indemnify that CLEC if it fails to acquire**
23 **such rights.” How is this assertion relevant to Issue IV-107?**

1 A. It is not relevant. As stated above, Issue IV-107 addresses the continuing
2 ownership of each party's intellectual property rights. It does not purport to address the
3 ownership, licensing or negotiation of intellectual property rights from third parties. That
4 has absolutely nothing to do with Issue IV-107. As WorldCom explained in detail to
5 Verizon during the mediation of this issue, this issue involves those circumstances in
6 which the use of either party's network may implicate the intellectual property rights of
7 the parties themselves – WorldCom and Verizon. This issue does not involve the
8 intellectual property rights of vendors or any other third party. As described below, even
9 Verizon's proposed contract language indicates that this assertion is irrelevant. Like
10 WorldCom's proposed language, Section 28.16.1 of the AT&T/Verizon agreement deals
11 solely with the intellectual property of each party.

12
13 **Q. Is Verizon's characterization of the August 2 mediations on this issue**
14 **accurate?**

15 A. In part. Verizon is correct that WorldCom and Verizon agreed to work from the
16 Verizon/AT&T Section 28.16.1, with WorldCom taking on the task of modifying that
17 section to include a limited license/right to use each other's intellectual property in
18 accordance with the interconnection agreement. However, Verizon and WorldCom also
19 agreed to include the first sentence of WorldCom's originally proposed Section 20.1.

20
21 **Q. After these mediations and WorldCom's proposed modifications, what is this**
22 **current language being negotiated between Verizon and WorldCom?**

23 A. The current language is:

1 Any intellectual property which originates from or is developed by
2 a Party shall remain in the exclusive ownership of that Party.
3 Except for the limited right to use (in accordance with this
4 Agreement) a Party's intellectual property that is embedded in, a
5 part of, or necessary or reasonably appropriate to the use of the
6 facilities, equipment, or services provided under this Agreement,
7 nothing in this Agreement shall be construed as the grant of a
8 license, either express or implied, with respect to any patent,
9 copyright, trade name, trade mark, service mark, trade secret, or
10 any other proprietary interest or intellectual property, now or
11 hereafter owned, controlled or licensable by either Party. Except
12 as provided above, neither Party may use any patent, copyrightable
13 materials, trademark, trade name, trade secret or other intellectual
14 property right of the other Party; except in accordance with the
15 terms of this Agreement or a separate license agreement between
16 the Parties granting such rights.

17
18 **Q. What is WorldCom's response to Verizon's Direct Testimony on this issue?**

19 A. Because Verizon does not address the issue, it is difficult to put forth an
20 appropriate response.⁶ As we noted in our Direct Testimony, in reading Verizon's

⁶ To the extent that Verizon attempts to inject new arguments for the first time in rebuttal, the Commission should allow WorldCom to file surrebuttal. Regardless of whether Verizon's refusal to join the issue in its Direct Testimony is accidental or intentional, WorldCom should not be left without an opportunity to respond to any argument they make that address the issues actually presented.

1 proposed Section 28.16.1, it appears that Verizon's position may be that the scope of the
2 license to use each other's intellectual property should be addressed in a separate
3 agreement. See Direct Testimony of Robert Peterson and Matt Harthun, 16. If that is
4 Verizon's position, it must be rejected. We explain in our Direct Testimony that to leave
5 the granting of rights of intellectual property use to a separate negotiation or document
6 would be "completely contrary to our experience." Id. It is only common sense that the
7 Interconnection Agreement set out the terms and limits by which the parties may access
8 all the features, functions and capabilities of the network elements.

9 Further, Verizon's proposed language (Section 28.16.1 of the Verizon/AT&T
10 agreement) precludes WorldCom's right even to use any Verizon intellectual property
11 consistent with the Interconnection Agreement. Both WorldCom's and Verizon's
12 proposed language indicates that each party's intellectual property remains that party's
13 and the Interconnection Agreement does not somehow transfer portions of that ownership
14 to the other party. Verizon's language, however, is too broad because it takes the extra
15 step of precluding even a limited use-license consistent with the terms and conditions of
16 the Interconnection Agreement.

17

18 **Q. What does WorldCom request of the Commission?**

19 A. WorldCom requests that the Commission order the inclusion of WorldCom's
20 proposed contract language, as set forth above in this Rebuttal Testimony.

21

22 **Q. Does this conclude your testimony?**

23 A. Yes.

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AFFIDAVIT OF ROBERT A. PETERSON AND MATTHEW HARTHUN

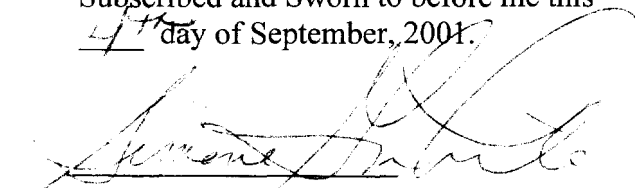
The undersigned, being of lawful age and duly sworn on oath, certifies the following:

I, Robert A. Peterson, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.



Robert A. Peterson

Subscribed and Sworn to before me this
4th day of September, 2001.



Notary Public

SIMONE G. WHITE

Notary Public, District of Columbia
My Commission Expires April 30, 2005


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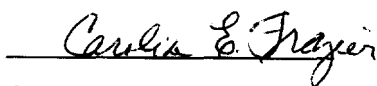
AFFIDAVIT OF ROBERT A. PETERSON AND MATTHEW HARTHUN

The undersigned, being of lawful age and duly sworn on oath, certifies the following:

I, Matthew Harthun, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.


Matthew Harthun

Subscribed and Sworn to before me this
5th day of September, 2001.



Notary Public
MY COMMISSION EXPIRES
JUNE 14, 2004